No. 17-1026

In The
Supreme Court of the United States

GILBERTO GARZA, JR.,

Petitioner,

v.

STATE OF IDAHO,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Idaho

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Does the "presumption of prejudice" recognized in *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), apply where a criminal defendant instructs his trial counsel to file a notice of appeal but trial counsel decides not to do so because the defendant's plea agreement included an appeal waiver?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
SUMMARY OF THE ARGUMENT	8
ARGUMENT	10
Defense Counsel Does Not Perform Deficiently And Does Not Presumptively Prejudice His Client When He Declines The Client's Request To Appeal Issues Within The Scope Of A Valid Appeal Waiver	10
A. Defense Counsel Does Not Perform Deficiently When He Declines The Client's Request To Appeal Issues Within The Scope Of A Valid Appeal Waiver	12
B. Defense Counsel Does Not Presumptively Prejudice His Client When He Declines The Client's Request To Appeal Issues Within The Scope Of A Valid Appeal Waiver	21
C. Practical Considerations Do Not Support Adopting A Presumption Of Prejudice Here	31
CONCLUSION	38

TABLE OF AUTHORITIES

Page

CASES

Anders v. California, 386 U.S. 738 (1967) 36
Bell v. Cone, 535 U.S. 685 (2002) 31
Boykin v. Alabama, 395 U.S. 238 (1969) 10
Charboneau v. State, 102 P.3d 1108 (Idaho 2004)..... 29, 34
Coleman v. Thompson, 501 U.S. 722 (1991) 35
Florida v. Nixon, 543 U.S. 175 (2004) 19, 22, 31, 33
Glover v. United States, 531 U.S. 198 (2001).....33
Harrington v. Richter, 562 U.S. 86 (2011) 12, 18
Hill v. Lockhart, 474 U.S. 52 (1985) 30, 33
Jones v. Barnes, 463 U.S. 745 (1983).....19
Kimmelman v. Morrison, 477 U.S. 365 (1986) 31, 33
Lee v. United States, 137 S. Ct. 1958 (2017) 12
Lockhart v. Fretwell, 506 U.S. 364 (1993).....22
Martinez v. Ryan, 566 U.S. 1 (2012) 34
Massaro v. United States, 538 U.S. 500 (2003) 34
McCoy v. Louisiana, 138 S. Ct. 1500 (2018).....20
McKinney v. State, 396 P.3d 1168 (Idaho 2017) 18, 19, 25, 26
Missouri v. Frye, 566 U.S. 134 (2012) 33
Nunez v. United States, 546 F.3d 450 (7th Cir. 2008) 14, 19
Padilla v. Kentucky, 559 U.S. 356 (2010).....33

TABLE OF AUTHORITIES—Continued

Page

Peguero v. United States, 526 U.S. 23 (1999) 14, 15

Rodriguez v. United States, 395 U.S. 327 (1969) 14, 15

Roe v. Flores-Ortega, 528 U.S. 470 (2000) .....*passim*

Smith v. Robbins, 528 U.S. 259 (2000) 22, 31, 32, 36

State v. Murphy, 872 P.2d 719 (Idaho 1994) 35

Strickland v. Washington, 466 U.S. 668 (1984) ...*passim*

United States v. Cronic, 466 U.S. 648 (1984) 22, 31

United States v. Mabry, 536 F.3d 231 (3d Cir. 2008) 26

Weaver v. Massachusetts, 137 S. Ct. 1899 (2017).....32

Williams v. Taylor, 529 U.S. 362 (2000).....12

Wong v. Belmontes, 558 U.S. 15 (2009).....12

Wright v. Van Patten, 552 U.S. 120 (2008) 31

Wright v. West, 505 U.S. 277 (1992).....12

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. VI 12

STATUTES

Idaho Code § 19-2514 1

STATEMENT OF THE CASE

1. In January of 2015, Gilberto Garza, Jr., entered an *Alford* guilty plea to aggravated assault. Pet. App. 28a. The following month, in a separate case, he pleaded guilty to possession of a controlled substance with intent to deliver. Pet. App. 28a. Both pleas were entered as part of binding plea agreements, which contemplated consecutive sentences of five years with two years fixed in the aggravated assault case and five years with one year fixed in the possession case, for aggregate sentences of three to ten years. Pet. App. 28a-29a. In exchange, the State of Idaho dismissed a persistent violator enhancement of the possession charge that would have made Garza eligible for a sentence of up to life without the possibility of parole, Idaho Code § 19-2514; agreed not to file additional felony counts of burglary and grand theft; and secured a promise from the Bureau of Alcohol Tobacco and Firearms not to refer Garza for prosecution for unlawful possession of ammunition. Pet. App. 41a, 47a.

The binding plea agreements "barred Garza from appealing the convictions and sentences." Pet. App. 29a. Both agreements stated that "Defendant Gilberto Garza Jr. waives his right to appeal. . . ." Pet. App. 29a, 44a, 49a. Garza signed and dated both agreements and initialed the appeal-waiver provisions. Pet. App. 29a, 45a, 50a. When filling out the guilty plea advisory form in the possession with intent case four days before he signed the plea agreement, *compare* R. 93 (guilty plea questionnaire completed February 20, 2015) *with* App. 50a (plea agreement signed February 24, 2015), Garza

checked "no" on the question of whether he was waiving appeal rights, R. 97, ¶ 19. In the aggravated assault case he checked "yes" in relation to having waived his appeal rights. R. 109, ¶ 19. At the sentencing hearing, the district judge asked the prosecutor if he should still inform Garza of his appeal rights despite the waiver. R. 132 (Tr., p. 35, Ls. 6-9). The prosecutor stated that "in [her] experience" such an advisory of rights was still given. R. 132 (Tr., p. 35, Ls. 10-15). The district court so advised Garza. R. 132 (Tr., p. 35, Ls. 16-21). Garza was given the sentences he bargained for. Pet. App. 2a. He did not appeal. Pet. App. 3a.

2. About four months later, Garza filed petitions for post-conviction relief in state district court. Pet. App. 3a. Garza's *pro se* petitions alleged three claims for relief: (1) that he received ineffective assistance of counsel, (2) that his pleas were involuntary, and (3) that the calculation of credit for pre-sentencing incarceration was inaccurate. R. 6, 206. His claim that trial counsel was ineffective included that trial counsel "failed to file an appeal of sentence within 42 day limit." R. 7, 207 (capitalization altered). For relief, Garza requested that his consecutive sentences be run concurrently. R. 7, 207.

Garza supported his claim that counsel was ineffective for failing to file an appeal of his sentences with an affidavit asserting his counsel "failed to file an appeal within 42 day limit after I continuously reminded him via phone calls and letters." R. 210 (capitalization altered), *see also* R. 10. The district court granted

Garza's request for appointed post-conviction counsel. R. 24, 224.

The district court summarily dismissed most of Garza's claims, including Garza's claims that the pleas were involuntary. R. 26-36, 62-66, 226-36, 263-67. After reviewing the guilty plea agreements, guilty plea advisory forms, and the entry of plea hearing audio recordings, the district court concluded that Garza's "petitions do not allege facts sufficient to make out a *prima facie* case that Garza's guilty pleas were coerced or otherwise invalid." R. 30, 230.

However, the district court found that Garza's assertion that "his counsel was ineffective for failing to file an appeal" was a "potentially viable claim." R. 31, 231. The district court, while summarily dismissing every other claim, therefore allowed "further proceedings" on the sole remaining claim. R. 64-65, 265-66.

3. Both parties moved for summary judgment on the claim that Garza's trial counsel was ineffective for failing to file an appeal. R. 75-169, 273-361. In addition to portions of the record from the criminal cases, the state submitted affidavits from Garza's trial counsel in support of its motion. R. 147-52, 351-56. Trial counsel's sworn statement included the following:

> Mr. Garza indicated to me that he knew he agreed not to appeal his sentence(s) but he told me he wanted to appeal the sentence(s) of the court. Mr. Garza received the sentence(s) he bargained for in his ICR 11(f)(1)(c) Agreement. I did not file the appeal(s) and informed

> Mr. Garza that an appeal was problematic because he waived his right to appeal in his Rule 11 agreements.

Pet. App. 52a.

Garza did not support his motion with additional evidence. R. 164-69, 273-78. In his memorandum he conceded that "[a]n examination of the record would lead a reasonable person to conclude the [appeal] waiver was by the book"; that Garza "received exactly what he bargained for in exchange for his plea"; and that "[t]here was no ambiguity in sentencing regarding the penalty he received." R. 161-62, 276-77. Nevertheless, Garza maintained that "his right to appeal should be reinstated." R. 160, 275.

The district court ordered Garza to file supplemental briefing, and submit any necessary evidence, "to identify the issues he wants to pursue on appeal, as well as to explain to the Court why his appeals would not be frivolous and not be subject to dismissal as a result of his waiver of the right to appeal in his plea agreements." R. 172, 367. Garza responded that "[t]he only issue that could be identified is sentencing review." R. 176, 371. He did not submit additional evidence, but pointed out that "in his guilty plea form in [the possession case], on page 5 of 8 question 19 asks if he has waived his right to appeal? His response is a checked no box." R. 177, 372. Garza concluded his supplemental briefing by requesting that the district court "reinstate his right to appeal in both of his cases." R. 178, 373.

The district court entered an order denying Garza's motion and granting the state's motion for summary judgment, dismissing the remaining claim of ineffective assistance of counsel for failing to file an appeal. Pet. App. 28a-39a. Without controlling Idaho authority on the effect of the appeal waiver, the district court turned to the split in the federal circuits and concluded the minority rule, that prejudice was not presumed in the face of an appeal waiver, was "better reasoned." *Id.* at 36a-38a. Pursuant to that standard, the court required Garza to show prejudice by "show[ing] non-frivolous grounds for asking the appellate court to decide his appeal on the merits, despite the appeal waiver"—in other words, Garza needed to show "that there are non-frivolous grounds for contending on appeal either that (i) the appeal waiver is invalid or unenforceable, or (ii) the issues he wants to pursue on appeal are outside the waiver's scope." *Id.* at 38a.

The district court concluded that Garza failed to show prejudice. *Id.* at 38a-39a. As to the first manner of showing prejudice, the district court found that Garza had not shown that the waivers were invalid or unenforceable because the record of the criminal cases established they were "valid parts of plea agreements into which Garza knowingly, voluntarily, and intelligently entered." *Id.* at 38a. The district court concluded Garza had not met the second manner of proving prejudice because "the [sentencing] appeals Garza asked his counsel to file have not even been argued, much less shown, to be outside the scope of Garza's appeal

waivers." *Id.* at 38a. *See also* Pet. App. 31a (sentencing was the only issue Garza identified that he wanted to appeal).

4. Garza appealed from the district court's order summarily dismissing his petitions, R. 196-98, 391-93, challenging only the district court's dismissal of his ineffective assistance of counsel claim, *see* Pet. App. 16a. The Idaho Court of Appeals affirmed. *Id.* at 25a-27a. The Court of Appeals noted that while "a defendant may still file a notice of appeal after waiving his or her appellate rights," the waiver prevented a decision on the merits. *Id.* at 26a. Quoting the district court, the Court of Appeals therefore held Garza's loss of an "'opportunity to see his appeal dismissed without a decision on the merits'" was not presumptively prejudicial. *Id.* at 26a. "Moreover," the court stated, "forcing an attorney to file an appeal—despite a waiver of appellate rights—impedes an attorney's ability to exercise professional judgment in deciding whether to file a notice of appeal. An attorney has a duty to avoid frivolous litigation, and filing a futile appeal is frivolous." *Id.* at 26a (internal citation omitted).

The Court of Appeals determined "the minority rule advances the attorney's duty to preserve the benefit of the plea agreement—thereby protecting the defendant." *Id.* at 26a-27a. The Idaho Court of Appeals concluded that "Garza was required to make a showing of prejudice with evidence that the waiver was invalid or unenforceable or that the claimed issues on appeal were outside the scope of the waiver." *Id.* at 27a. Because "Garza . . . made no such showing or argument,"

the Court of Appeals affirmed the dismissal of the petitions. *Id.* at 27a.

5. The Idaho Supreme Court granted review and affirmed. Pet. App. 1a-15a. Like the district court and the Idaho Court of Appeals before it, the Idaho Supreme Court applied the minority rule, which "does not presume deficiency or prejudice when an attorney denies his client's instruction to file an appeal when there has been an appeal waiver." *Id.* at 8a. The court therefore declined "to presume counsel ineffective for failing to appeal at Garza's request when Garza has waived the right to appeal," and held instead that "Garza must show deficient conduct and resulting prejudice." *Id.* at 10a. The Idaho Supreme Court concluded that any exception to the *Strickland* standard set forth in *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), would not apply here, because "[o]nce a defendant has waived his right to appeal in a valid plea agreement, he no longer has a right to such an appeal." Pet. App. 11a. Thus, the Idaho Supreme Court concluded, "the presumption of prejudice articulated in *Flores-Ortega* would not apply after a defendant has waived his appellate rights." *Id.* at 11a. Because Garza needed to "show deficient performance and resulting prejudice to prove ineffective assistance of counsel," and because he "cannot show such grounds," the Idaho Supreme Court affirmed the dismissal of Garza's petitions. *Id.* at 15a.

SUMMARY OF THE ARGUMENT

In *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), this Court applied the case-by-case analysis of *Strickland v. Washington*, 466 U.S. 668 (1984), to an allegation that an attorney was ineffective for not filing an appeal. It stated that a lawyer who fails to appeal upon request performs deficiently where filing the appeal is merely ministerial, but rejected an inquiry into deficient performance of counsel that was not "circumstance-specific." *Flores-Ortega*, 528 U.S. at 477-78. It further held that counsel's deficient performance regarding filing an appeal presumptively prejudices the defendant if it denies a defendant an appeal that he "wanted at the time and to which he had a right," but rejected a *per se* prejudice standard that did not inquire into whether counsel's actions "caus[ed] the forfeiture of the defendant's appeal." *Id.* at 483-84.

The Idaho Supreme Court's decision to "decline to presume counsel ineffective for failing to appeal at Garza's request when Garza [had] waived the right to appeal as part of a plea agreement," Pet. App. 10a, was correct and consistent with *Flores-Ortega* and the general application of *Strickland* on a case-by-case basis. Where, as here, a defendant requests an appeal that he has previously waived as part of a plea agreement, the filing of an appeal is not a merely ministerial act, but instead requires legal analysis of the sort regularly engaged in by defense counsel. Nor is a defendant prejudiced where counsel declines to pursue a waived appeal because counsel's actions cannot forfeit an appeal that the client already affirmatively waived.

Garza argues counsel was ineffective because there are other issues (such as the voluntariness of the plea and waiver) that would have been entertained by an appellate court despite the appeal waiver. This is inconsistent with the inquiry set forth in *Flores-Ortega*. First, it is not deficient performance to not file an appeal different than the one requested by the client, especially an appeal that might deprive the client the benefit of his plea agreement without his consent. Second, the argument ignores the conditions precedent to a determination that counsel forfeited the appeal: that the client both wanted the appeal and that he had a right to it. Garza wanted an appeal of his sentences. However, he had no right to an appeal of his sentences because of the waiver. Even if he had a right to raise other issues, he never claimed that was the appeal he wanted.

This Court's precedents mandate an evaluation of counsel's actions and any potential prejudice in light of the facts, including the appeal waiver and the appeal requested. A legal standard that requires counsel to pursue appellate goals other than those articulated by the client (the appeal he "wanted"), and perhaps at odds with the client's desires, merely because that is the only appeal to which he had a "right," is contrary to those precedents. Garza has failed to show any reason to deviate from this Court's established precedents applying the *Strickland* standard on a case-by-case basis.

The judgment of the Idaho Supreme Court should be affirmed.

ARGUMENT

Defense Counsel Does Not Perform Deficiently And Does Not Presumptively Prejudice His Client When He Declines The Client's Request To Appeal Issues Within The Scope Of A Valid Appeal Waiver

A criminal defendant who pleads guilty waives many constitutional rights, including his privilege against self-incrimination, his right to trial by jury, and his right to confront his accusers. *See Boykin v. Alabama*, 395 U.S. 238, 243 (1969). Some criminal defendants further agree, in their plea agreements, to waive their rights to appeal their convictions and sentences. This case concerns defense counsel's obligations when a defendant who pleaded guilty and waived his right to appeal asks counsel to file an appeal that is plainly within the scope of the appeal waiver. Both Garza and his counsel stated that Garza only asked counsel to appeal the sentence the trial court imposed—a matter unquestionably covered by his appeal waiver. Counsel did not perform deficiently when he declined that request, any more than he would have performed deficiently had he declined a demand by Garza post-plea that he confront his accusers. At the very least, a defendant such as Garza is not presumptively prejudiced when his counsel declines to file an appeal on a plainly waived matter.

Garza argues that to show ineffective assistance of counsel he need only prove that he requested an appeal and that his attorney did not file a notice of appeal. Brief for Pet. 10-43. His underlying premise is that "a number of fundamental issues concerning the validity, scope, and enforceability of [the] plea agreement and waiver" may be raised despite the appeal waiver. *Id.* at 16. Thus, counsel's decision to not file the notice of appeal forfeits these issues, *id.* at 16-23, and usurps the client's choice of whether to appeal, *id.* at 23-28. He further argues that it would be "profoundly unfair" to require a petitioner to prove more than that he asked for an appeal and that the attorney did not file one, *id.* at 29-33, and that imposing a burden of proof beyond these two facts would be unworkable and a waste of judicial resources, *id.* at 33-43. This argument, however, is contrary to this Court's requirement that a court consider all of the circumstances confronting counsel when reviewing his or her performance, and that counsel's actions prejudice a defendant only where counsel's actions caused the forfeiture of an appeal the client both wanted and had a right to. *Roe v. Flores-Ortega*, 528 U.S. 470 (2000). Because Garza requested an appeal of his sentence, an appeal within the scope of the waiver, counsel was not deficient in concluding the requested appeal was waived, and Garza suffered no forfeiture of an appeal he both wanted and to which he had a right.

A. Defense Counsel Does Not Perform Deficiently When He Declines The Client's Request To Appeal Issues Within The Scope Of A Valid Appeal Waiver

1. To establish ineffective assistance of counsel, a claimant must generally show both "that counsel's performance was deficient" to the point counsel was "not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment," and that the deficient performance "prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "[T]he *Strickland* test 'of necessity requires a case-by-case examination of the evidence.'" *Williams v. Taylor*, 529 U.S. 362, 391 (2000) (quoting *Wright v. West*, 505 U.S. 277, 308 (1992) (Kennedy, J., concurring in judgment)). "[C]ategorical rules are ill suited to an inquiry that we have emphasized demands a case-by-case examination of the totality of the evidence." *Lee v. United States*, 137 S. Ct. 1958, 1966 (2017) (internal quotations and citations omitted).

To establish deficient performance, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687-88. "A court considering a claim of ineffective assistance must apply a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance." *Harrington v. Richter*, 562 U.S. 86, 104 (2011) (quoting *Strickland*, 466 U.S. at 689). "[T]he performance inquiry necessarily turns on 'whether counsel's assistance was reasonable considering all the circumstances.'" *Wong v.*

Belmontes, 558 U.S. 15, 17 (2009) (quoting *Strickland*, 466 U.S. at 688-89).

This analysis "applies to claims, like the respondent's, that counsel was constitutionally ineffective for failing to file a notice of appeal." *Flores-Ortega*, 528 U.S. at 476-77. Specifically, "'[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel'" and "courts must 'judge the reasonableness of counsel's challenged conduct on the facts of the particular case,'" showing a high degree of deference. *Id.* at 477 (brackets original) (quoting *Strickland*, 466 U.S. at 688-90). In *Flores-Ortega*, the Court rejected the circuit court's bright line rule that counsel "is *per se* deficient" if he fails to file a notice of appeal unless the defendant specifically instructed him not to, because such a test fails to "engage in the circumstance-specific reasonableness inquiry required by *Strickland*." *Id.* at 478.

2. The "circumstances faced by defense counsel" under the "facts of [this] particular case" are that Garza requested an appeal of his sentence even though such an appeal was squarely within the scope of a valid plea waiver. Trial counsel correctly concluded that attempting the requested appeal was "problematic." Not only was there no reasonable hope of attaining the requested appellate review of the sentences under the facts of this case, there was the real possibility that the prosecution would be released from its obligations under the plea agreement—and therefore entitled to charge additional felonies and seek an enhancement

that could result in a life sentence. Trial counsel acts reasonably and competently when he does not cost his client the benefit of the plea bargain merely to file an appeal that would necessarily be rejected as waived.

As Judge Easterbrook explained, a lawyer "might have a responsibility to file an appeal if the client indicated a desire to withdraw the plea, for that amounts to a declaration by the defendant of willingness to give up the plea's benefits, and withdrawal would abrogate the waiver too." *Nunez v. United States*, 546 F.3d 450, 455 (7th Cir. 2008). But where, as here, a defendant "does not contend that he told his lawyer that he had any desire to achieve that goal by an appeal," the lawyer "has a duty to his client to avoid taking steps that will cost the client the benefit of his plea bargain." *Id.* Indeed, "[a] defendant has more reason to protest if a lawyer files an appeal that jeopardizes the benefit of the bargain than to protest if the lawyer does nothing—for 'nothing' is at least harmless." *Id.*

3. Garza glosses over the nature of his appeal request based on the Court's statement in *Flores-Ortega* that "a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable." Brief for Pet. 12 (quoting 528 U.S. at 477 (citing *Rodriguez v. United States*, 395 U.S. 327 (1969); *Peguero v. United States*, 526 U.S. 23, 28 (1999))). That sentence cannot bear the weight Garza places on it for neither *Flores-Ortega*, *Rodriguez*, nor *Peguero* involved an appeal to which the defendant had no right by virtue of a valid

waiver. These cases do not require a court to ignore the facts of an appeal waiver and that the defendant requested to appeal a waived issue.

In *Rodriguez*, "counsel failed to file a notice of appeal, despite being instructed by the defendant to do so," and the defendant "was entitled to a new appeal without any further showing." *Flores-Ortega*, 528 U.S. at 485. However, Rodriguez was convicted after a trial. *Rodriguez*, 395 U.S. at 328, 331. The reason Rodriguez had no duty to make a further showing was because his "'*right* to an appeal [had] been frustrated.'" *Flores-Ortega*, 528 U.S. at 485 (emphasis and brackets added) (quoting *Rodriguez*, 395 U.S. at 330). In *Peguero*, the issue before the Court was "whether a district court's failure to advise a defendant of his right to appeal as required by the Federal Rules of Criminal Procedure provides a basis for collateral relief even when the defendant was aware of his right to appeal when the trial court omitted to give the advice." *Peguero*, 526 U.S. at 24. In its analysis the Court set forth the holding of *Rodriguez*, that "a defendant is entitled to resentencing and to an appeal without showing that his appeal would likely have had merit," but stated that holding "is not implicated here." *Id.* at 28. Neither of these cases purport to resolve whether counsel performs deficiently by declining to file a requested appeal to which the defendant had no right.

Nor did *Flores-Ortega* address the issue presented here. In fact, *Flores-Ortega* differs from this case on two levels. First, the Court left undisturbed the lower courts' finding that Flores-Ortega did *not* specifically

instruct his counsel to file a notice of appeal. *Flores-Ortega*, 528 U.S. at 475. Thus, the question presented was whether counsel was "deficient for not filing a notice of appeal when the defendant has not clearly conveyed his wishes one way or the other," and turned on counsel's duty to consult about an appeal. *Id.* at 477-78. Second, and more importantly, unlike Garza, Flores-Ortega did not waive his appeal rights. *See id.* at 488 n.1 (Souter, J., concurring in part and dissenting in part) ("there is no claim here that Flores-Ortega waived his right to appeal as part of his plea agreement"). *Flores-Ortega* therefore did not address whether counsel performs deficiently when he fails to comply with a client's request to appeal on an issue within the clear scope of a valid plea agreement appeal waiver.

All Garza can muster to support his argument that the waiver is irrelevant is to note that *Flores-Ortega* referenced appeal waivers in dicta later in the opinion when addressing an entirely different issue. *See* Brief for Pet. 15 (citing *Flores-Ortega*, 528 U.S. at 480). From this, Garza draws the negative inference that the Court established a "rule" that appeal waivers are irrelevant when assessing whether counsel performed deficiently by failing to file a requested notice of appeal. *Id.* That "dicta squared" approach to interpreting this Court's opinions cannot be right. Had *Flores-Ortega* directly spoken to the issue presented here it would have been dicta for the reasons set out in the prior paragraph. The Court's refusal to offer such dicta does not somehow transmogrify into a legal rule

on the matter about which it was silent based on other dicta on a different issue offered elsewhere in the opinion.

4. The reasoning in *Flores-Ortega* supports the Idaho Supreme Court's ruling on the deficient performance issue. This Court identified three reasons why failure to file a requested appeal generally constitutes deficient performance: (1) "a defendant who instructs counsel to initiate an appeal reasonably relies upon counsel to file the necessary notice"; (2) failure to file the appeal "cannot be considered a strategic decision"; and (3) "filing a notice of appeal is a purely ministerial task, and the failure to file reflects inattention to the defendant's wishes." 528 U.S. at 477. None of these reasons supports finding deficient performance here.

First, Garza did not "reasonably rely" on counsel to file the requested appeal of his sentences. Garza affirmatively waived such an appeal in his plea agreement. Counsel informed him that the appeal waiver rendered his request for an appeal of his sentences "problematic" and that he would not be filing an appeal. Relying on counsel to attempt to invoke a validly waived right is not reasonable.

Second, whether to file a requested appeal despite an appeal waiver *is* a strategic decision. Analyzing and resolving legal issues related to whether to appeal despite a waiver (such as whether a particular claim survives the waiver or whether the waiver itself may be challenged) is squarely within the wide range of professional assistance provided by counsel. Garza's only

hope of securing appellate review of his sentences was to show that the issue was outside the scope of his waiver. *See, e.g.*, *McKinney v. State*, 396 P.3d 1168, 1178 (Idaho 2017) (to proceed on appeal in face of appeal waiver, appellant must show good cause). An assessment of the scope of the appeal waiver is well within the scope of counsel's normal representation. Because counsel correctly concluded that Garza had no right to the requested appeal of his sentences, this factor does not tend to show counsel's performance was outside "the 'wide range' of reasonable professional assistance." *Harrington*, 562 U.S. at 104 (quoting *Strickland*, 466 U.S. at 689).

Third, whether to follow a client's instructions contrary to the client's formal waiver is a choice with legal ramifications, not merely a ministerial act. As discussed, attempting to appeal despite the waiver might have cost Garza the benefit of the plea agreement. Pet. App. 14a. Garza never claimed he would have wanted to risk the prosecution re-filing dismissed charges or otherwise acting on the breached plea agreement where he had no chance of securing appellate review of his sentence. Unlike in *Flores-Ortega*, the issue facing Garza's counsel was substantive, not merely ministerial.

On top of that, waivers are enforced by the Idaho courts. Pet. App. 4a-5a. "Once a defendant has waived his right to appeal in a valid plea agreement, he no longer has a right to such an appeal." *Id.* at 11a. "It is true that a defendant may still file a notice of appeal after waiving his or her appellate rights—but the

appellate waiver denies the defendant a decision on the merits." *Id.* at 26a. To get Garza his requested appeal of his sentences, counsel would have had to show cause why the appeal was not barred by the waiver. *See McKinney*, 396 P.3d at 1178.

That changes the calculus. As Judge Easterbrook explained, "[a] defendant who waits past the time for appeal (10 days in federal court) before asking his lawyer to proceed cannot expect that this will be done as a 'purely ministerial' task, for after 10 days there is no longer a right to appeal; likewise there is no longer a right to appeal following a waiver. Filing an appeal after a waiver is no more a 'ministerial duty' than preparing for trial would be a lawyer's ministerial duty after the defendant pleads guilty." *Nunez*, 546 F.3d at 454.

5. Garza is equally off base when he asserts that trial counsel performed deficiently because he "usurp[ed] a decision committed to the client alone." Brief for Pet. 23 (italics omitted). No one disputes that the decision whether to appeal was Garza's. *See Florida v. Nixon*, 543 U.S. 175, 187 (2004); *Jones v. Barnes*, 463 U.S. 745, 751 (1983). Garza made that decision, however, when he waived his appeal rights. Because Garza had no surviving right to an appeal of his sentences, trial counsel no more "usurped" Garza's decision than he usurped Garza's right to a jury trial or to confront his accusers.

Indeed, Garza's proposed rule is the one that jeopardizes defendants' autonomy. Garza wanted an

appeal to challenge his sentences; the relief he requested was concurrent sentences. R. 7, 207. Yet he now argues that trial counsel must be presumed ineffective for failing to pursue an appeal to invalidate the plea agreement entirely. Brief for Pet. 16-17. Deciding "the objective of the defense" is a decision "reserved for the client." *McCoy v. Louisiana*, 138 S. Ct. 1500, 1508 (2018). A legal standard requiring counsel to raise on appeal "issues concerning the validity, scope, and enforceability of [the] plea agreement and waiver," Brief for Pet. 16, when the defendant specifically requested a challenge only to his sentences, would be the actual usurpation.

One of Garza's amici, The Ethics Bureau at Yale, recognizes that an attorney in trial counsel's position, who has been asked to appeal in the face of a clear appellate waiver, must consult with the client before "mak[ing] arguments on appeal that could breach the client's plea agreement." Amicus Br. 4; *see also id.* at 13-14 (whether to put the "entire plea agreement at risk" is a choice for the client to make once he appreciates and understands the consequences of that choice). But Garza has never claimed that his counsel was ineffective for failing to consult with him about pursuing an appeal to undo the plea agreement after Garza requested an appeal to challenge his sentences. Rather, he has always maintained that the request for an appeal of his sentences alone triggered the duty to appeal. It did not.

* * *

Where a client has both waived appeal rights and subsequently requested an appeal, he or she is attempting to invoke a previously waived right. Under the "circumstance-specific reasonableness inquiry required by *Strickland*," *Flores-Ortega*, 528 U.S. at 478, counsel who correctly concludes that the client is asking to invoke a validly waived right does not perform deficiently by declining to file a frivolous notice of appeal that will be summarily dismissed and which might prompt the government to rescind the agreement. Although a request to invoke a validly waived appellate right might lead to a duty of further consultation (a circumstance not alleged and not at issue in this case), it does not lead to a constitutional duty to file an appeal that might invalidate the plea agreement.

Trial counsel concluded that Garza's requested appeal of the sentences was barred by his valid prior waiver. Garza did not claim, much less demonstrate, that counsel's analysis was incorrect. Garza therefore failed to show that not filing the requested appeal of the sentences was deficient performance by trial counsel.

B. Defense Counsel Does Not Presumptively Prejudice His Client When He Declines The Client's Request To Appeal Issues Within The Scope Of A Valid Appeal Waiver

Even if counsel's performance could be deemed deficient, Garza failed to show he was prejudiced by

counsel's actions. To show prejudice Garza had the burden of showing counsel forfeited an appeal that Garza both wanted and to which he had a right. Before the Idaho courts Garza asserted he wanted an appeal of his sentences, but did not establish that he had a right to such an appeal. Before this Court he asserts he had a "right to appeal a number of fundamental issues," Brief of Pet. 16, but fails to show that he wanted, much less requested, such an appeal. Garza failed to establish the prerequisites of his claim of prejudice.

1. To establish prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A "case-by-case prejudice inquiry" has "always been built into the *Strickland* test." *Lockhart v. Fretwell*, 506 U.S. 364, 369 n.2 (1993). There is a "narrow exception to *Strickland*'s holding that a defendant who asserts ineffective assistance of counsel must demonstrate not only that his attorney's performance was deficient, but also that the deficiency prejudiced the defense." *Nixon*, 543 U.S. at 190 (citing *United States v. Cronic*, 466 U.S. 648 (1984)). This exception applies a presumption of prejudice from deficient performance in three circumstances: (1) where there has been a denial of counsel; (2) where there has been "state interference with counsel's assistance"; and (3) where counsel has acted on an "actual conflict of interest." *Smith v. Robbins*, 528 U.S. 259, 287 (2000) (internal quotations omitted, citing *Strickland*, 466 U.S. at 692; *Cronic*, 466 U.S. at 659 n.25).

In *Flores-Ortega*, the Court reaffirmed that a defendant claiming ineffective assistance of counsel generally must "show actual prejudice—'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" 528 U.S. at 481-82 (quoting *Strickland*, 466 U.S. at 694). The Court recognized, however, that where counsel has been "actually or constructively" denied altogether the resulting proceeding cannot be deemed reliable. *Id.* at 483. Thus, prejudice should be presumed where the defendant was denied an appeal that he "wanted at the time and to which he had a right." *Id.* The Court rejected a "*per se* prejudice rule" that would have entitled a petitioner to relief "solely upon a showing that counsel had performed deficiently" because it "ignore[d] the critical requirement that counsel's deficient performance must actually cause the forfeiture of the defendant's appeal." *Id.* at 484. The Court went on to hold that where a defendant showed that counsel failed to consult regarding an appeal, prejudice could be proved by showing that the deficient performance deprived him or her "of an appeal that he otherwise would have taken." *Id.*

2. Garza did not demonstrate the "critical requirement" that his counsel's actions caused the forfeiture of an appeal Garza both "wanted" and "to which he had a right." *Id.* at 483-84. Garza wanted an appeal of his sentences. Pet. App. 52a. He failed to show that he had a right to such an appeal in the face of his waiver. The loss of the proceeding that Garza wanted and requested, an appeal of his sentences, was due to

Garza's own waiver, not counsel's actions. Simply put, counsel did not, and could not, forfeit what Garza had already validly waived. Any alleged deficient performance did not, therefore, "actually cause the forfeiture of the defendant's appeal." *Flores-Ortega*, 528 U.S. at 483-84. The Idaho courts properly did not presume prejudice.

3. Garza contends that a "tripartite logic" of "forfeiture," "usurpation," and "unfairness" supports a presumption of prejudice in cases where counsel concludes the appeal his client wants is barred by a valid waiver of appeal rights. Brief for Pet. 15-33. It does not. To the contrary, each of the three considerations Garza cites cuts in favor of applying the general case-by-case prejudice inquiry.

a. The first part of Garza's suggested analysis is forfeiture. *Flores-Ortega* held that a defendant is denied counsel altogether, and therefore entitled to a presumption of prejudice, if counsel's performance did not merely lead to "a judicial proceeding of disputed reliability," but rather led "to the forfeiture of a proceeding itself." 528 U.S. at 483. A condition precedent to applying a presumption of prejudice is that the defendant "had a right" to the proceeding that he "wanted." *Id.* Otherwise, the defendant does not satisfy the "critical requirement that counsel's deficient performance must actually cause the forfeiture of the defendant's appeal." *Id.* at 484.

Here the proceeding Garza "wanted" was an appeal of his sentences. But Garza had previously waived an appeal of his sentences as part of a valid plea agreement. Thus, the only proceeding he could have obtained was to respond to an order to show cause why the appeal was not barred by the waiver. *McKinney*, 396 P.3d at 1178. The opportunity granted by Idaho's procedure to show cause why the appeal is not barred was, in this case, neither an appeal of the sentences nor a viable pathway to an appeal of the sentences. Counsel's actions did not forfeit Garza's requested appeal of his sentences—that proceeding was waived by Garza.

Garza claims trial counsel's actions forfeited "a number of fundamental issues concerning the validity, scope and enforceability of [the] plea agreement and waiver." Brief for Pet. 16. This argument fails for three reasons.

First, the proper forfeiture analysis is whether "counsel's constitutionally deficient performance" deprived Garza "of an appeal that he otherwise would have taken." *Flores-Ortega*, 528 U.S. at 484. The presumption of prejudice applies only if counsel's deficient performance forfeited a proceeding the defendant "wanted" and "to which he had a right." *Id.* at 483. Garza alleged that the appeal he wanted and would have taken was an appeal of his sentences, with the ultimate goal of getting them run concurrently. R. 7, 207. He made no claim that he wanted or would have taken an appeal to challenge the validity, scope or enforceability of the plea agreement and waiver. Garza should not be presumed prejudiced because counsel

did not take an unbidden—and potentially ruinous—course of action.

Second, Garza's argument confuses the proceeding to establish an appeal right despite the waiver with the appeal itself. Although courts, quite understandably and properly, give defendants opportunities to challenge waivers of appeal rights, the proceeding to show an appeal right despite the waiver is not necessarily an appeal itself. *See, e.g.*, *United States v. Mabry*, 536 F.3d 231, 241-42 (3d Cir. 2008). Had counsel filed notices of appeal in the underlying cases, such would not have secured the requested appeal of his sentences, but only the opportunity to show cause why the waiver did not bar the appeal. *McKinney*, 396 P.3d at 1178. Only if Garza's counsel showed that Garza was asserting an unwaived claim, or that the waiver itself was invalid, could counsel have secured an appeal of the sentences as requested by Garza. *Id.* at 1178-79. A valid appeal waiver such as that entered by Garza "denies the defendant a decision on the merits." Pet. App. 26a. Garza provided "no reason to think his hoped-for appeals would not be dismissed as a result of his appeal waivers." Pet. App. 32a. Although Garza's trial counsel could have filed a notice of appeal, he could have secured an appeal of Garza's sentences only if he showed cause why that appeal issue was not waived. Because he could not have made that showing, trial counsel did not forfeit the already waived appeal.

Finally, adoption of Garza's argument that a challenge to the scope or validity of the plea waiver is always required despite the underlying appeal request

would undercut this Court's analysis in *Flores-Ortega*. There, in relation to determining if counsel had an obligation to consult with a client about an appeal, this Court stated, "the court must consider such factors as whether the defendant received the sentence bargained for as part of the plea and whether the plea expressly reserved or waived some or all appeal rights." *Flores-Ortega*, 528 U.S. at 480. Garza's claim that his appeal waiver is irrelevant to his ineffective assistance of counsel claim cannot be reconciled with this language.

Trial counsel therefore did not "forfeit" the requested appeal of Garza's sentences.

b. The second part of Garza's "tripartite logic" argument is that counsel "usurp[ed] a decision committed to the client alone." Brief for Pet. 23-28 (italics omitted). As explained, *supra*, at 19-21, that argument fails because Garza personally made the decision not to appeal his sentences when he signed the plea agreements. Counsel simply held Garza to that choice. Had Garza wished to withdraw from the plea agreements, he could have asked counsel to do so. Counsel then would have had to evaluate whether any valid grounds to withdraw existed and would have had to confer with Garza about the potential risks, such as a potential the prosecution would reinstate the charges and enhancements that could result in a sentence of up to life. But Garza did not ask counsel to withdraw from the agreements. Having accepted (as far as trial counsel knew) the agreements to which he entered, he was bound by their terms. That was his choice, not counsel's.

c. The final part of Garza's "tripartite logic" is the claim that it would be "profoundly unfair" to require a petitioner in his circumstances to show prejudice. Brief for Pet. 29-33. This argument takes the Court's comments in *Flores-Ortega* out of context. Moreover, it is not "unfair" to require Garza to prove his claim of ineffective assistance of counsel.

In *Flores-Ortega*, this Court held that "a defendant must demonstrate that there is a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed." *Flores-Ortega*, 528 U.S. at 484. The Court stated that showing nonfrivolous grounds for appeal would be "highly relevant" to establishing the petitioner probably would have appealed but for the lack of consultation. *Id.* at 485-86. The Court would not, however, "foreclose the possibility" of a defendant showing he probably would have appealed but for the lack of consultation even if he or she could not demonstrate a potentially meritorious appeal issue. *Id.* at 486. The Court reasoned, in part, that this was because "it is unfair to require an indigent, perhaps *pro se*, defendant to demonstrate that his hypothetical appeal might have had merit *before any advocate has ever reviewed the record in his case in search of potentially meritorious grounds for appeal*." *Id.* (original emphasis omitted, emphasis added). The present case, however, is not about a failure to consult. Garza had the benefit of trial counsel, who considered Garza's request for an appeal of his sentences but concluded that the requested appeal was barred by Garza's appeal waiver.

Flores-Ortega's discussion of "unfairness" therefore has no application here.

Garza also had the assistance of post-conviction counsel[1] to establish that trial counsel's analysis was flawed and that Garza's requested appeal was not barred, but Garza and his counsel never argued that trial counsel's analysis was incorrect. Pet. App. 38a. It was not "unfair" to require Garza and his post-conviction counsel to present evidence that trial counsel's performance in evaluating the scope or validity of the appeal waiver was deficient, and that but for counsel's deficient evaluation there is a reasonable probability Garza would have been able to pursue his desired appeal.

Garza also contends that "the facts of this case illustrate the unfairness of requiring a defendant to identify and support the claims he would raise on appeal prior to receiving the assistance of appellate counsel." Brief for Pet. 32. He specifically points out that he checked "no" in relation to the question of whether he was waiving his appeal rights on a guilty plea questionnaire in one of the two underlying criminal cases. *Id.* As an initial matter, Garza's acknowledgement that the facts of his two cases differ, and that such

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[1] In Idaho a post-conviction petitioner is entitled to appointment of counsel if he or she "alleges facts to raise the possibility of a valid claim." *Charboneau v. State*, 102 P.3d 1108, 1112 (Idaho 2004). After Garza filed his *pro se* petition the district court appointed counsel, and Garza was represented through every stage of the post-conviction proceedings. R. 24, 224.

difference might matter for the analysis, merely underscores the propriety of a case-by-case prejudice evaluation.

Moreover, it was not "unfair" to require Garza to demonstrate that the "no" check showed that his counsel was ineffective under the facts of this case. If the "no" answer were a basis for challenging the voluntariness of his waiver, to show prejudice Garza would have been required to establish that he would have actually challenged the voluntariness of his waiver despite the likelihood that he would have lost the benefit of his plea agreement. *See Flores-Ortega*, 528 U.S. at 485-86 (citing *Hill v. Lockhart*, 474 U.S. 52, 59 (1985) (requiring petitioner to demonstrate that he would have "insisted" on invoking the forfeited proceeding)). Rather than attempting to use this anomaly in the record to establish his claim, however, Garza invoked a presumption and made no effort to actually prove deficient performance or prejudice. It was not "unfair" to require Garza to prove under *Strickland* that the "no" answer, or any other fact in either of the cases, meant that counsel had deficiently evaluated Garza's appeal rights and there was a reasonable probability that Garza would have pursued a particular appeal but for the deficient performance.[2]

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[2] As it turns out, the Idaho district court found on post-conviction review that, although Garza had pointed out the negative answer on the guilty plea questionnaire, he "never" contended at "any stage of these post-conviction cases" that he "did not appreciate or understand the appeal waivers when he entered his pleas." Pet. App. 31a.

Requiring Garza to show that trial counsel was ineffective in this case is not more onerous or unfair than requiring petitioners in other contexts to prove both prongs of *Strickland*. This Court has rejected application of the *Cronic* presumption, and required proof under *Strickland*, in all but a few narrow fact patterns. *Wright v. Van Patten*, 552 U.S. 120, 124 (2008). It has rejected applying any presumption of prejudice where counsel failed "to adduce mitigating evidence" and waived closing argument, *Bell v. Cone*, 535 U.S. 685, 697 (2002); where counsel failed to file a timely motion to suppress before trial, *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986); where counsel in a capital case conceded guilt (but argued against application of the death penalty), *Nixon*, 543 U.S. at 189-92; and where counsel failed to file a merits brief on appeal after concluding no issues were meritorious, *Robbins*, 528 U.S. at 285-88. Even if Garza's fairness argument were relevant, it is not unfair to require him to support his claims with evidence and ultimately prove that counsel was deficient in his assessment of whether Garza could appeal his sentence and that the deficient performance resulted in the forfeiture of appeal proceedings Garza both wanted and had a right to.

C. Practical Considerations Do Not Support Adopting A Presumption Of Prejudice Here

Garza contends that applying the standard *Strickland* analysis "imposes heavy burdens on both the litigants and the courts" and that it is "far more efficient simply to grant a defendant a new appeal once he has

demonstrated that his attorney disregarded his instruction to file a notice of appeal." Brief for Pet. 37-38. Garza is wrong on the law and the facts.

On the law, this Court does not deem a class of attorney errors to be presumptively prejudicial merely because a case-by-case prejudice inquiry would be more burdensome on the parties and the courts. Rather, attorney error is presumptively prejudicial if it is "tantamount to a denial of counsel." *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1915 (2017) (Alito, J., concurring). The three categories of cases meeting this demanding standard are actual denial of counsel, government interference with counsel's assistance, and an actual conflict of interest. *Robbins*, 528 U.S. at 287. Even if Garza were correct, and it would take more judicial and party resources to litigate his claim of ineffective assistance of counsel than it would to simply grant him an appeal, that would not put him in any of the categories where a presumption is appropriate.

On the facts, it is far from clear that Idaho, or any other jurisdiction, would conserve resources by simply granting appeals in cases such as this one. As set forth above, applying a case-by-case *Strickland* standard requires the petitioner to prove counsel forfeited an appeal that the petitioner wanted and to which he had a right.[3] Such is not more onerous or resource intensive

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[3] Garza contends the ruling of the Idaho Supreme Court requires demonstration of "a non-frivolous appellate claim that is not barred by his appeal waiver." Brief for Pet. 37. That is incorrect. The court ruled that a petitioner must demonstrate an issue not rendered frivolous because it was barred by the appellate

than other claims of ineffective assistance of counsel, such as claims counsel was ineffective in relation to a guilty plea, *Missouri v. Frye*, 566 U.S. 134, 140 (2012); *Hill*, 474 U.S. at 58; *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010); for not filing a timely motion to suppress, *Kimmelman*, 477 U.S. at 375; at sentencing, *Glover v. United States*, 531 U.S. 198, 204 (2001); or at trial, *Nixon*, 543 U.S. at 189–192.

Garza contends that requiring any showing other than counsel did not file a notice of appeal would be "virtually impossible" because of the "almost infinite potential for variation among appeal waivers." Brief for Pet. 36. This gets things backwards. It is the "infinite variety" of potential errors by defense counsel that mandates a case-by-case prejudice analysis in the first place. *Strickland*, 466 U.S. at 693. Evaluating whether counsel forfeited an appeal that his or her client wanted and had a right to is no more "impossible" than making the prejudice determination with respect to attorney errors in plea negotiations, pre-trial motions, or trials. For each situation, there is an "almost infinite potential for variation." Yet courts regularly determine

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waiver. The decision of the Idaho Supreme Court does not require a petitioner to demonstrate a likelihood that he or she would have prevailed on the merits of an appeal issue. Pet. App. 10a-11a. *See also id.* at 38a (district court required Garza to show "non-frivolous grounds for asking the appellate court to decide his appeal on the merits"). The merits of any appellate claim are irrelevant to the analysis. The only question is whether counsel deprived the client of the right to have those merits decided by an appellate court.

whether counsel's performance was deficient and the defendant thereby prejudiced.

Garza nonetheless argues that habeas and post-conviction proceedings are necessarily more resource intensive because petitioners are "almost always acting *pro se*." Brief for Pet. 37. This is not true in Idaho, where appointment of counsel is required upon a showing of "the possibility of a valid claim." *Charboneau*, 102 P.3d at 1112. Nor is it true in this case, because Garza had appointed counsel to represent him. Even if accurate in relation to other cases and other jurisdictions, this argument does nothing to distinguish this case from the vast majority of claims where *Strickland* requires proof of deficient performance and prejudice. This Court has recognized that states and the federal government properly channel ineffective assistance claims to post-conviction proceedings, rather than to appeals. *See Martinez v. Ryan*, 566 U.S. 1, 13 (2012); *Massaro v. United States*, 538 U.S. 500, 504-05 (2003). They do so because non-record information is usually required to resolve the claims. Defendants in Garza's situation are no differently situated than other defendants who wish to assert ineffectiveness-of-trial-counsel claims.

Ultimately it is not an onerous burden to require a petitioner to show that trial counsel's determination that the requested appeal was barred by the waiver was deficient, and that such deficiency caused the forfeiture of an appeal the defendant wanted and to which he had a right. Here counsel's performance was not

deficient because he accurately concluded that the requested appeal was within the scope of a valid waiver. If counsel had been incorrect, however, and the appeal was outside the scope of the waiver, or the waiver was invalid, Garza would have met his burden on the first prong of *Strickland*. And in that situation, it would hardly have been difficult or resource intensive for Garza to have shown that he would have both wanted and had a right to the appeal he requested.

Applying the standard case-by-case *Strickland* analysis would not be unfair for still another reason. As this Court has explained, "the justification for a conclusive presumption disappears when application of the presumption will not reach the correct result most of the time." *Coleman v. Thompson*, 501 U.S. 722, 737 (1991). Presuming prejudice where counsel fails to comply with defendants' requests to appeal waived issues does not remotely meet that test. In only the rarest of cases will a defendant surmount the waiver and gain appellate review of a claim covered by an appeal waiver. And even claims falling outside the waiver rarely succeed. Although one of Garza's amici points to examples of successful post-appeal-waiver claims, see Amicus Br. of IACDL at 11-20, the amicus fails to divulge how often defendants assert such claims and how often they fail. In the state's experience, defendants' efforts to withdraw from plea agreements based on claims of involuntariness or ineffective assistance of counsel rarely succeed. *See, e.g.*, *State v. Murphy*, 872

P.2d 719, 720 (Idaho 1994) ("the ability to waive the right to appeal as part of a negotiated plea agreement serves an important public interest").

Garza argues it is "more efficient" to merely proceed with whatever proceedings would follow the filing of a notice of appeal, because this would avoid having to duplicate proceedings and because courts generally have a mechanism for the quick processing of waived appeals. Brief for Pet. 37-40. That appellate courts have developed procedures to swiftly dispense with appeals rendered frivolous by appeal waivers is hardly grounds for doing away with *Strickland* proof. More importantly, a standard that encourages frivolous appeals has no real hope of conserving judicial resources. *See Robbins*, 528 U.S. at 294 ("no one has a right to a wholly frivolous appeal") (Souter, J., concurring) (citing *Anders v. California*, 386 U.S. 738, 742 (1967)). That most appeals in the face of waivers can be quickly and efficiently dealt with (presumably because most should be summarily dismissed) is not a ground for presuming ineffective assistance of counsel.

* * *

Garza claimed that his trial counsel was ineffective for not appealing Garza's sentences. There is no dispute that Garza's counsel correctly concluded he could not have obtained appellate review of Garza's sentences because such was within the scope of Garza's valid appeal waiver. Nevertheless, relying on *Flores-Ortega*, Garza claims that his counsel's performance

was deficient and that he must be presumed prejudiced. *Flores-Ortega*, however, deemed counsel's failure to file a requested appeal deficient only where the filing of an appeal was merely ministerial. Likewise, it would only presume prejudice if counsel's deficient performance forfeited a proceeding Flores-Ortega wanted and had a right to. Neither feature exists here. The presence of a valid appeal waiver in Garza's plea agreement rendered the filing of an appeal of the sentences more than merely ministerial. And counsel's actions did not cause forfeiture of an appeal Garza had the right to assert because he affirmatively waived that right. The Idaho Supreme Court faithfully adhered to this Court's general precedents requiring a case-by-case, fact-based analysis and correctly declined to presume counsel provided ineffective assistance of counsel.

CONCLUSION

The decision of the Idaho Supreme Court should be affirmed.

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